

APPEAL NO. 051167
FILED JUNE 10, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 29, 2005. The hearing officer resolved the disputed issue by deciding that the appellant's (claimant) compensable injury of _____, does not include the current diagnoses of elevated creatine phosphokinase, cervical facet arthropathy, cervicalgia, spinal cord stimulator malfunction, and myofascial pain syndrome. The claimant appeals the hearing officer's decision. The respondent (carrier) asserts that the claimant's appeal was not timely filed with the Texas Workers' Compensation Commission (Commission) and requests affirmance.

DECISION

The hearing officer's decision has become final pursuant to Section 410.169 because the claimant's appeal was not timely filed with the Commission.

Section 410.202(a) provides that to appeal the decision of a hearing officer, a party shall file a written request for appeal with the Appeals Panel not later than the 15th day after the date on which the decision of the hearing officer is received from the division and shall on the same date serve a copy of the request for appeal on the other party. Section 410.202 was amended effective June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code from the computation of time in which to file an appeal or a response. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(d) (Rule 102.5(d)) provides in pertinent part that for purposes of determining the date of receipt for those written communications sent by the Commission which require the recipient to perform an action by a specific date after receipt, unless the great weight of the evidence indicates otherwise, the Commission shall deem the received date to be five days after the date mailed. See *also* Rule 143.3(d)(1) which provides that the hearing officer's decision is deemed received five days after mailing, unless the great weight of the evidence indicates otherwise. Rule 143.3(e) provides that a request for review shall be presumed to be timely filed if it is: (1) mailed on or before the 15th day after the date of receipt of the hearing officer's decision; and (2) received by the Commission not later than the 20th day after the date of receipt of the hearing officer's decision. Both portions of Rule 143.3(e) must be complied with for an appeal to be timely. Texas Workers' Compensation Commission Appeal No. 042688, decided December 1, 2004.

Records of the Commission reflect that the hearing officer's decision was mailed to the claimant on April 7, 2005. The cover letter to the hearing officer's decision contains the same address for the claimant as is shown as the claimant's return address on the envelope in which he mailed his appeal to the Commission. Pursuant to Rules 102.5(d) and 143.3(d)(1), the claimant is deemed to have received the hearing officer's decision on Tuesday, April 12, 2005, unless the great weight of the evidence

indicates otherwise. Although the claimant states in his appeal that he received the hearing officer's decision on April 26, 2005, the Appeals Panel has held that when Commission records show mailing to the claimant on a particular day at the correct address, the mere assertion that the decision was received after the deemed date of receipt is not sufficient to extend the date of receipt past the deemed date of receipt provided by Commission rule. Appeal No. 042688, *supra*. The 15th day after the claimant's deemed date of receipt, excluding Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code, was May 4, 2005, and the 20th day was May 11, 2005. The envelope in which the claimant mailed his appeal to the Commission is postmarked May 17, 2005, and the Commission received the appeal on May 23, 2005. Since the claimant's appeal was mailed to the Commission after May 4, 2004, it was not timely filed with the Commission. Section 410.169 provides in pertinent part that a decision of a hearing officer regarding benefits is final in the absence of a timely appeal by a party.

Having determined that the hearing officer's decision and order have become final under Section 410.169 because a timely appeal was not filed with the Commission, the Appeals Panel does not have jurisdiction to review the hearing officer's decision.

The true corporate name of the insurance carrier is **TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION for Reliance National Indemnity Company, an impaired carrier** and the name and address of its registered agent for service of process is

**MARVIN KELLEY, EXECUTIVE DIRECTOR
9120 BURNET ROAD
AUSTIN, TEXAS 78758.**

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge